Office - Supreme Court, U.S.
FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-38

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

CHARLES JUSTIN COOPER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state constitutional amendment that conforms to the contours of the Fourteenth Amendment the remedial power of state courts to order mandatory pupil transportation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Interest of the United States	2
Statement	2
Summary of argument	9
Argument	11
I. Modification of state law going beyond the requirements of the Equal Protection Clause does not violate the Fourteenth Amendment	11
II. Proposition 1 does not create an impermissible racial classification	15
III. Proposition 1 does not impose special burdens on racial minorities	18
IV. Proposition 1 was not motivated by a discriminatory purpose	23
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252	24, 26
Austin Independent School District v. *United States*, 429 U.S. 990	14, 27
Board of Education v. *Superior Court*, 448 U.S. 1343	7, 8
Brinkman v. *Gilligan*, 518 F.2d 853, cert. denied, 423 U.S. 1000	14
Brown v. *Board of Education*, 347 U.S. 483	16
Brown v. *Califano*, 627 F.2d 1221	14
Bustop, Inc. v. *Board of Education:*	
439 U.S. 1380	4
439 U.S.C. 1384	4

Cases—Continued Page

City of Memphis v. *Green*, No. 79-1176 (Apr. 20, 1981) 29
City of Mobile v. *Bolden*, 446 U.S. 55 ..... 27, 28
Columbus Board of Education v. *Penick*, 443 U.S. 449 26
Dayton Board of Education v. *Brinkman*, 443 U.S. 526 ..... 10, 12
Deal v. *Cincinnati Board of Education*, 369 F.2d 55, cert. denied, 389 U.S. 847 14
Diaz v. *San Jose Unified School District*, 612 F.2d 411 14
Estes v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437 ..... 25, 27
Fay v. *New York*, 332 U.S. 261 13
Gordon v. *Lance*, 403 U.S. 1 18
Hunter v. *Erikson*, 393 U.S. 385.....9, 10, 12, 15, 18, 19, 21
Jackson v. *Pasadena City School District*, 59 Cal. 2d 876, 130 Cal. Rptr. 724 3
James v. *Valtierra*, 402 U.S. 137 .....16, 21, 29
Keyes v. *School District No. 1*, 413 U.S. 189 ..... 18, 25
Los Angeles NAACP v. *Los Angeles Unified School District*, 513 F. Supp. 717 vacated, 650 F.2d 1004, on remand, 518 F. Supp. 1053 9
McGinnis v. *Royster*, 410 U.S. 263 29
Michael M. v. *Superior Court*, 450 U.S. 464 25
McLaughlin v. *Florida*, 379 U.S. 184 16
Morales v. *Shannon*, 516 F.2d 411, cert. denied, 423 U.S. 1034 14
NAACP v. *Lansing Board of Education*, 559 F.2d 1042, cert. denied, 434 U.S. 997 14
New State Ice Co. v. *Liebmann*, 285 U.S. 262 12
Palmer v. *Thompson*, 403 U.S. 217 .....13, 23, 29
People v. *Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 28
Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 .....16, 24, 25, 26
Reeves, Inc. v. *Stake*, 447 U.S. 429 12-13
Reitman v. *Mulkey*, 387 U.S. 369 .....9, 11, 12, 23, 30
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 13

Cases—Continued Page

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 14
United States v. *O'Brien*, 391 U.S. 367 29
United States v. *Texas Education Agency*, 564 F.2d 162 ..... 14, 27
Washington v. *Davis*, 426 U.S. 229 27
Weinberger v. *Wiesenfeld*, 420 U.S. 636 25
Whalen v. *Roe*, 429 U.S. 589 13

Constitutions, statutes and rules:

United States Constitution:
Fourteenth Amendment 10, 12, 19, 20, 23
Due Process Clause 9
Equal Protection Clause 2, 9, 10, 11, 12, 14, 16, 18, 20, 23, 27
Cal. Const.:
art. 1:
§ 7(a) (amended 1979) 2, 6, 11, 13, 16, 19
§ 27 28
art. 2, § 8 4
art. 18:
§ 1 4
§ 3 4
§ 4 5
Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 1971 *et seq.*:
Title IV, 42 U.S.C. 2000c-6 2
Title VI, 42 U.S.C. 2000d 2
Title VII, 42 U.S.C. 2000e-5(g) 20
Title IX, 42 U.S.C. 2000h-2 2
Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* 2
20 U.S.C. 1701(a)(2) 14
20 U.S.C. 1714(a) 14
28 U.S.C. 1292(b) 9
42 U.S.C. 3612(c) 20

Constitutions, statutes and rules—Continued Page

Cal. App. and Sup. Ct. R.:

Rule 24 9
Rule 25 9

Miscellaneous:

Comment, 10 Golden Gate L. Rev. 611 (1980)..... 4, 5, 6
Comment, 75 Nw. L. Rev. 685 (1980) 5, 6, 7
Comment, 26 U.C.L.A. L. Rev. 1183 (1979) 5
L. A. Times, June 19, 1979, § 1 5
S. F. Examiner & Chronicle:

Mar. 23, 1979, § 1 6
Oct. 7, 1979, § A 4
Nov. 4, 1979, § A 5, 28

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-38

MARY ELLEN CRAWFORD, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the state court of appeal (Pet. App. 1A to 71A) is reported at 113 Cal. App. 3d 633, 170 Cal. Rptr. 495. The opinions of the state superior court (Pet. App. 76A to 80A, 81A to 93A) are unreported.

An earlier opinion of the state supreme court is reported at 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724. An earlier opinion of the state court of appeal is reported at 69 Cal. App. 3d 66, 137 Cal. Rptr. 793.

Opinions issued in 1978 and 1980 by Justices of this Court denying applications for stays are reported at 439 U.S. 1380, 439 U.S. 1384 and 448 U.S. 1343.

JURISDICTION

The judgment of the state court of appeal was entered on December 19, 1980 (Pet. App. 1A). A petition for hearing was denied by the state supreme court on March

11, 1981 (Pet. App. 73A). The petition for a writ of certiorari was filed in this Court on July 8, 1981 and was granted on October 13, 1981. The jurisdiction of the Court rests on 28 U.S.C. 1257(3).

INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibilities with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* The United States has participated as either a party or amicus curiae in virtually every one of the Court's cases involving allegations of racial discrimination in public schools, including *Washington* v. *Seattle School District No. 1*, No. 81-9, scheduled for oral argument in tandem with this case, in which the United States is a party.

STATEMENT

This case, like *Washington* v. *Seattle School District No. 1*, No. 81-9, involves a constitutional challenge to an attempt by the citizens of a state to enact legislation favoring neighborhood schools. Here, the voters and legislature of the State of California adopted a constitutional amendment, known as Proposition 1, that freed school boards in the state from "any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation" (Cal. Const. art. 1, § 7(a) (amended 1979)). The plaintiffs in an ongoing state court case seeking elimination of racial imbalance in the Los Angeles school district challenged the federal constitutionality of the Proposition. The state court of appeal concluded that Proposition 1 is constitutional, and the California Supreme Court denied hearing.

1. In 1963, a number of minority children attending school in the Los Angeles Unified School District filed a

class action in state superior court seeking the elimination of racial imbalance in the district's schools (17 Cal. 3d at 286). In 1968, after years of unsuccessful settlement efforts by the plaintiffs, the case proceeded to trial (*id.* at 287).[1] In 1970, the trial court issued an opinion finding the school district racially imbalanced (*id.* at 287-289) and ordering the board of education immediately to prepare and implement a racial balancing plan (*id.* at 289).

On appeal, the California Supreme Court affirmed the lower court order on the basis of California precedent that school boards bear a state constitutional obligation "to take reasonably feasible steps to alleviate school segregation 'regardless of its cause'" (17 Cal. 3d at 285, quoting *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 881, 130 Cal. Rptr. 724, 726 (1963)), although the court stated that the trial court's findings supported the conclusion that the district's racial imbalance was the result of de jure segregation.

On remand, the trial court reviewed and rejected the school board's first submitted racial balancing plan, which provided for only limited mandatory reassignment of students (Pet. App. 86A). Subsequently, the trial court permitted implementation of the board's second submitted plan, which required mandatory reassignment of approximately 40,000 students and extensive transpor-

---

[1] At the time of trial, the district was the largest in the State of California, encompassing an area of 711 square miles and having an enrollment of 650,000 students (Pet. App. 23A). Of these, 53.6% were white, 22.6% black, 20% Hispanic, and 3.8% Asian, American Indian or other (*ibid.*). "[T]he bulk of minority pupils attended schools having well above 50 percent combined minority enrollment, and the bulk of white pupils attended schools having well above 50 percent white enrollment" (*id.* at 24A to 25A). In October 1980, the district's student population was 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian, American Indian or other (*id.* at 23A, n.2). Approximately 16% of the student population in grades K-3 was white (*ibid.*).

tation (Pet. App. 86A to 87A).[2] In the fall of 1978, the plan was put into effect (Pet. App. 4A to 5A). By the fall of 1979, all parties wanted the plan discontinued (*ibid.*).[3] In October 1979, the trial court began hearings for the purpose of considering alternatives (Pet. App. 88A).

2. In March 1979, the state legislature approved, and, in November 1979, the voters of the State of California, by a more than two-to-one margin, ratified state constitutional amendment Proposition 1 (Pet. App. 5A).[4] The

---

[2] During the summer of 1978, prior to the plan's utilization, a community organization named Bustop, Inc., intervened in the case and moved to stay its implementation, contending, *inter alia*, that the plan violated a federal right of parents and school children to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy" (*Bustop, Inc.* v. *Board of Education*, 439 U.S. 1380, 1382 (1978)). A stay was denied in the trial court, granted by the court of appeal, but summarily vacated by the California Supreme Court (Op. Cert. 3). A stay was also denied in this Court. *Bustop, Inc.* v. *Board of Education*, 439 U.S. at 1383 (Rehnquist, J., on application for stay) ("While I have the gravest doubts that the [California] Supreme Court was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.") Accord *Bustop, Inc.* v. *Board of Education*, 439 U.S. 1384 (1978) (Powell, J., on reapplication for stay).

[3] A mutual complaint was that the plan subjected some children to daily bus rides lasting two to four hours. See Comment, 10 Golden Gate L. Rev. 611, 675 n.315 (1980).

According to the director of Californians Against Proposition 1, a former public relations representative for the chapter of the American Civil Liberties Union participating in the Los Angeles case, the plan was "irrational and absurd" (*S.F. Examiner & Chronicle*, Oct. 7, 1979, § A, at 6, col. 1). She charged at the time that the plan "maximizes inconvenience and anxiety and minimizes integration" (*id.* at 2).

[4] Under California law, an amendment to the state constitution may be proposed either by an initiative petition (Cal. Const. art. 2, § 8; art. 18, § 3) or, as in the case of Proposition 1, by a two-thirds vote of each house of the state legislature (art. 18, § 1). A proposed amendment becomes effective if, like Proposition

Proposition amends the California constitution to provide that in assigning and transporting students, state and local officials are subject to no state constitutional "obli-

---

1, it is approved by a majority of voters at a statewide election (art. 18, § 4).

Proposition 1 was introduced in the California legislature on December 4, 1978 by a state senator representing a portion of Los Angeles (Comment, *supra* note 3, 10 Golden Gate L. Rev. at 611, 675 n.317). Unlike similar resolutions which had been unsuccessfully introduced by the senator in the past (*id.* at 611-612), Proposition 1 won quick legislative approval. It was widely reported that, as the senator concluded, "[t]he whole legislative thing turned around" as a result of indications that the trial court in this case was considering implementation of a massive multidistrict racial balancing plan (*id.* at 612, 676 n.328). See Comment, 75 Nw. L. Rev. 685, 691 (1980) (in the fall of 1978, the trial judge was advised by court-appointed experts that, because of Los Angeles' diminishing white student population, effective integration of the district's schools would require a "metropolitan" busing plan involving more than 100 suburban school districts not then parties to the suit). See also Comment, 26 U.C.L.A. L. Rev. 1183, 1193 (1979).

On January 18, 1979, the state senate approved the Proposition by a vote of 31 to 5 (Comment, *supra*, 75 Nw. L. Rev. at 691). On March 22, 1979, after a debate which "consisted primarily of anti-busing sentiments and counter charges of racism" (Comment, *supra* note 3, 10 Golden Gate L. Rev. at 678), the Proposition passed the state assembly by a vote of 62 to 17 (Comment, *supra*, 75 Nw. L. Rev. at 691). The legislature subsequently scheduled the Proposition and three other measures, including a highly controversial constitutional amendment to limit government spending, for submission to the state's voters at a special November 1979 election (*id.* at 692 n.51).

According to news reports, the ensuing campaign for the Proposition was "low key, low budget and low visibility" (*S.F. Examiner & Chronicle*, Nov. 4, 1979, § A, at 6, col. 1). The proponents of the Proposition consistently denied any opposition to racial integration (Comment, *supra*, note 3, 10 Golden Gate L. Rev. at 659). They insisted that integration was not the issue. They stressed the advantages of neighborhood schools (*S.F. Examiner & Chronicle*, Oct. 7, 1979, *supra*) and the disadvantages of court-ordered busing, which they called "neither educationally sound nor sociologically effective" (*L.A. Times*, June 19, 1979, § 1, at 3, col. 5).

In the official California Ballot Pamphlet distributed to voters prior to the election, the Proposition's sponsor stated that "the

gations or responsibilities which exceed those imposed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution" (Cal. Const. art. 1, § 7(a)). The Proposition therefore prohibits state courts from imposing on state or local officials any state constitutional obligation or responsibility to assign or transport students "unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy [a] specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution" (*ibid.*).[5]

On November 15, 1979, the school board requested the trial court, pursuant to Proposition 1, to "hold a hearing to determine whether a federal court, sitting today, would find a *de jure* violation and impose a remedy involving pupil school assignment or pupil transportation" (Pet. App. 9A; Op. Cert. 4).[6] The plaintiffs responded with a

---

intent and purpose of my amendment is to prohibit any California judge from ordering mandatory busing unless the busing is required by federal law" (Comment, *supra* 75 Nw. L. Rev. at 731 n.301). He explained that the Proposition is "based on the conclusion that forced busing is *not* a useful tool in achieving desegregation" (Comment, *supra* note 3, 10 Golden Gate L. Rev. at 660). Court-ordered busing, he stated "stands in the way of community support for voluntary integration" (*ibid.*).

[5] The Proposition, however, further provides that (Cal. Const. art. 1, § 7(a)):

> Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

At the time of the Proposition's enactment, a number of California school districts—including those in San Francisco, Berkeley, El Centro and Fresno—voluntarily operated mandatory, non-neighborhood racial balancing plans. *S.F. Examiner & Chronicle*, Mar. 23, 1979, § 1, at 6, col. 3.

[6] The school board relied on a section of the Proposition providing that (Cal. Const. art. 1, § 7(a)):

> Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other

request that the trial court declare Proposition 1 unconstitutional (Pet. App. 83A).

In May 1980, after completion of the desegregation plan hearings begun in October 1979, the trial court issued an opinion (Pet. App. 76A to 93A) concluding that Proposition 1 had no bearing on the case before it (*id.* at 79A to 80A, 92A to 93A). Relying on its 1970 finding that the school board was guilty of de jure segregation, the court concluded that "[t]he [1970] mandate in this case, as affirmed by the California Supreme Court, requires the same results as would be required under the same set of facts in the federal court decisions" (*id.* at 77A to 80A, 84A to 85A, 90A to 93A). In July 1980, the court entered an order directing the school board to immediately implement a revised racial balancing plan (*id.* at 10A). The revised plan, like the one previously implemented, required extensive mandatory pupil reassignments and transportation (*ibid.*). Both the school board and petitioners appealed to the state court of appeal.[7]

---

order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

At the time of the Proposition's enactment, thirteen California school districts were operating under state court-ordered or approved racial balancing plans (Comment, *supra* note 4, 75 Nw. L. Rev. at 690).

[7] With the new school year approaching and the appeals pending, the school board applied to the California court of appeal for an extraordinary writ of mandamus staying implementation of the new plan (*Board of Education* v. *Superior Court*, 448 U.S. 1343-1344 (1980)). The court of appeal ordered that consideration of the appeals be expedited and, in the meantime, partially stayed implementation of the plan insofar as it relied on a numerical quota defining desegregated schools and required mandatory busing of students currently attending substantially desegregated schools (*ibid.*). The court denied a stay in all other respects (*ibid.*). The California Supreme Court also denied a stay, recommending only

4. On appeal, the trial court's May and July orders were vacated and the case was remanded for further proceedings (Pet. App. 70A to 71A). In an opinion issued December 19, 1980, the California court of appeal found that the trial court had erred in finding Proposition 1 inapplicable to the case (Pet. App. 11A to 49A). The court concluded (1) that the trial court's 1970 findings did not support the conclusion that racial imbalance in Los Angeles schools was the result of a federal equal protection violation,[8] (2) that federal courts therefore would not be authorized to require mandatory student transportation to remedy the imbalance, and (3) that, as a result, Proposition 1 prohibits state court imposition on the Los Angeles school board of an obligation to assign or transport students (*id.* at 48A to 49A).

The court of appeal also concluded that Proposition 1 does not violate the federal constitution (Pet. App. 69A

---

that the court of appeal further expedite consideration of the appeals (*ibid.*). Justice Rehnquist denied a stay, *Board of Education* v. *Superior Court, supra*, and in September 1980 the school district opened the school year under the new plan (Op. Cert. 5).

[8] According to the court of appeal, "[t]he thrust of the findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to *de jure* segregation in violation of the Fourteenth Amendment" (Pet. App. 35A). The court of appeal held that this conclusion was incorrect as a matter of law (*id.* at 37A). The court concluded from a review of the decisions of this Court that (*id.* at 31A):

> the federal Constitution only authorizes court assignment and transportation of pupils on the basis of race when there has been state action which intentionally segregated with discriminatory purpose. If no such state action has occurred, elimination or alleviation of racial segregation which has resulted from economic causes and from neighborhood residential pattern is a matter left to local school authorities.

The court stated (*id.* at 34A to 35A) that "[w]hen the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found." The petitioners do not challenge this correction by the court of appeal of the trial court's finding (Pet. i-ii).

to 70A). The court discussed and rejected the plaintiffs' contentions (*id.* at 56A) that the Proposition "removes a previously given state right" in violation of the Equal Protection Clause, as interpreted by this Court in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967) and *Hunter* v. *Erickson*, 393 U.S. 385 (1969), "reflects intent to segregate with discriminatory purpose" in violation of the Equal Protection Clause, or "retroactively divests plaintiffs of adjudicated rights" in violation of the Due Process Clause (*id.* at 50A to 69A). On March 1, 1981, the California Supreme Court denied hearing (Pet. App. 73A), at which time the court of appeals' decision became final under state law. See Cal. Cts. App. and Sup. Ct. R. 24, 25.[9]

SUMMARY OF ARGUMENT

Proposition 1 modifies a state constitutional provision that goes beyond the requirements of the Equal Protection Clause. Since the repeal or modification of existing state procedural or substantive rights is unconstitutional only

---

[9] The desegregation plan that had been implemented in September 1980 was terminated almost immediately thereafter. After an unsuccessful attempt by petitioners to convince either the trial court, the state court of appeal, or the state supreme court to enjoin this termination, an action seeking such an injunction was filed in the United States District Court for the Central District of California. That court concluded on the basis of the state trial court's 1970 findings that petitioners had shown there was a fair chance they could prove federally offensive de jure segregation. It rejected res judicata and abstention arguments and issued a temporary restraining order preventing the plan's termination. *Los Angeles NAACP* v. *Los Angeles Unified School District*, 513 F. Supp. 717 (C.D. Cal. 1981). This order was vacated a day later by a divided panel of the United States Court of Appeals for the Ninth Circuit. *Los Angeles Unified School District* v. *District Court*, 650 F.2d 1004 (9th Cir. 1981). On remand, the district court denied the plaintiffs' motion for a preliminary injunction (Op. Cert. 7). The court also denied the school board's motion to dismiss the case on the grounds of abstention and res judicata. *Los Angeles NAACP* v. *Los Angeles Unified School District*, 518 F. Supp. 1053 (C.D. Cal. 1981). This latter denial has been certified by the district court for interlocutory appeal (Op. Cert. 7). See 28 U.S.C. 1292(b).

if those rights are "required in the first place by the Fourteenth Amendment," *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531 n.5 (1979), Proposition 1 does not run afoul of the proscriptions of the Equal Protection Clause.

Proposition 1, moreover, does not classify persons according to race or impose "special burdens" on racial minorities within the meaning of *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969). While Proposition 1 deals with a racial issue, it does not categorize California citizens along racial lines. The class allegedly disadvantaged by the enactment is not racially identifiable. Likewise, the Proposition does not impose "special burdens" upon racial minorities because following the enactment of Proposition 1, those minorities possess greater substantive and procedural rights under California law than are mandated by the Fourteenth Amendment. *Hunter* v. *Erickson*, *supra*, does not extend so far as to classify as a "special burden" a state action that places minorities in a more advantageous position than is required by the Equal Protection Clause.

Finally, Proposition 1 was not motivated by a discriminatory purpose. There is no evidence that Proposition 1 bears more heavily on racial minorities than on the majority. The motive force behind Proposition 1, as found by the court of appeal, was the desire of state voters, among other things, to conserve financial resources, maximize educational opportunities and enhance public participation in the educational process. Neither the impact, the sequence of events leading to its adoption, the substantive and procedural background, nor the legislative history of Proposition 1 raises an inference that the Proposition was motivated by other than a race-neutral belief in the advantages for all races of neighborhood schools. The finding of the state court on this question deserves substantial deference, for as this Court has noted in another case involving a California constitutional amendment, state courts are in an advantageous position to understand the circumstances concerning the motiva-

tion and potential impact of a challenged enactment. *Reitman* v. *Mulkey*, 387 U.S. 369, 378 (1967).

ARGUMENT

Proposition 1 expresses California's decision to limit judicial imposition of mandatory pupil assignment and transportation to school desegregation suits involving a violation of the Equal Protection Clause of the Fourteenth Amendment. Petitioners challenge this policy as being itself violative of the Equal Protection Clause. They argue that the Proposition creates an explicit racial classification and was motivated by a discriminatory purpose. The court of appeal correctly concluded that petitioners' arguments have no merit.

I. MODIFICATION OF STATE LAW GOING BEYOND THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

At least since 1976, when the California Supreme Court rendered its opinion in an earlier phase of this case, the state constitution has been interpreted as imposing upon California public school boards an affirmative duty "to take reasonably feasible steps to alleviate school segregation, whether such segregation is de jure or de facto in nature" (17 Cal. 3d at 289). In the performance of this duty, school boards were obligated to consider and implement mandatory student transportation whenever both "reasonably feasible" and necessary to produce "meaningful progress" toward alleviation of racial isolation (*id.* at 305-306, 309-310). As the court of appeal determined, Proposition 1 narrows this obligation: only if a federal court would be authorized under the United States Constitution to order busing (*e.g.*, where racial imbalance is de jure in nature), are school boards obligated to consider its use and state courts permitted to require it.[10]

---

[10] The California constitutional provision amended by Proposition 1 now states (Cal. Const. art. 1, § 7(a)):

> nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity,

Had California, like most other states, initially chosen to limit the state constitutional obligation to alleviate racial segregation to that imposed by the Fourteenth Amendment, its choice could hardly be assailed as unconstitutional. Petitioners do not contend otherwise. Rather, petitioners apparently assert that because California initially chose to impose a state constitutional desegregation obligation beyond that mandated by the Fourteenth Amendment, Proposition 1's subsequent limitation or modification of that obligation violates the Equal Protection Clause. As the court of appeal concluded (Pet. App. 62A to 63A), however, this argument is meritless.

This Court has long recognized that the Equal Protection Clause is not offended by the "mere repeal" of existing state ordinances or legislation going beyond the protections afforded by the United States Constitution. *Hunter* v. *Erickson*, 393 U.S. 385, 390 n.5 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369, 376 (1967). See also *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531 n.5 (1979) (*Dayton II*) ("rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment"). To establish a presumption to the contrary would be both constitutionally unwarranted and unwise. As this Court has frequently observed, much of the genius of our federal system lies in the opportunity it affords each state, if its people so choose, to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See, *e.g.*, *Reeves*,

---

board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of public school assignment or pupil transportation.

Accordingly, the provision further states that courts of the state, in enforcing the state constitution, are prohibited from ordering the assignment or transportation of students unless such an order could be entered by a federal court to remedy a federal equal protection violation (*ibid.*).

Inc. v. *Stake*, 447 U.S. 429, 441 (1980); *Whalen* v. *Roe*, 429 U.S. 589, 597 (1977); *Fay* v. *New York*, 332 U.S. 261, 296 (1947). Cf. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 50 (1973) ("No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education"). Inherent in all experimentation is the possibility of failure. A presumption that restricted the ability of a state to abandon or modify an experiment that it concluded was not working—as California has with respect to its experiment with busing to alleviate de facto racial segregation—would substantially inhibit any initial willingness to experiment.[11] Proposition 1 reflects a decision by the state's voters that California school boards should be judicially denied the discretion to use alternatives to mandatory busing only when the racial isolation to be alleviated is the product of intentional segregation. The state concluded, based on considerable practical experience, that public school children, their parents, and the community as a whole derive substantial benefits from neighborhood schools,[12] regardless of their racial makeup, and that, in the absence of intentional segregation, mandatory transportation beyond such schools does not pro-

---

[11] See *Palmer* v. *Thompson*, 403 U.S. 217, 228 (1971) (Burger, C.J., concurring) ("To hold * * * that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped * * *, would plainly discourage the expansion and enlargement of needed services in the long run").

[12] Proposition 1 provides in pertinent part (Cal. Const. art. 1, § 7(a)):

> In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

duce sufficient countervailing benefits for either the racial minority or majority to justify requiring its use as a matter of state constitutional law. This conclusion is not inherently discriminatory.[13] And far from ever intimating that such a conclusion is constitutionally suspect, this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971), unanimously stated that "[a]ll things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." [14]

Of course, a state's repeal of existing law, even if its initial enactment was not constitutionally required, is constitutionally suspect if it either creates a racial clas-

---

[13] Congress reached a similar conclusion in enacting the Equal Education Opportunities Act of 1974, wherein it declared it to be the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. 1701(a)(2). See also 20 U.S.C. 1714(a) ("No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student"); *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980); *Morales* v. *Shannon*, 516 F.2d 411 (5th Cir.), cert. denied, 423 U.S. 1034 (1975); *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir.), cert. denied, 423 U.S. 1000 (1975).

[14] Notwithstanding the difficulties that a neighborhood school policy poses to the alleviation of racial isolation resulting from residential patterns, utilization of such a policy by a school district has never been held to constitute a per se violation of the Equal Protection Clause. *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976); *id.* at 991 n.1 (Powell, J., concurring); *Diaz* v. *San Jose Unified School District*, 612 F.2d 411, 412 (9th Cir. 1979) ("[a] neighborhood school policy is not constitutionally suspect"); *United States* v. *Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977) (official discriminatory intent cannot be inferred solely from school board's use of a neighborhood school policy); *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1049 (6th Cir.), cert. denied, 434 U.S. 997 (1977); *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55, 60-61 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).

sification or, though facially neutral, serves as a subterfuge for intentional racial discrimination. As demonstrated below, however, Proposition 1 suffers from neither of these constitutional defects.

II. PROPOSITION 1 DOES NOT CREATE AN IMPERMISSIBLE RACIAL CLASSIFICATION

Relying on this Court's decision in *Hunter* v. *Erikson*, 393 U.S. 385 (1969), petitioners contend that Proposition 1 embodies an "explicitly racial classification" that is not warranted by a compelling state interest. In *Hunter*, the Court upheld an equal protection challenge to a city charter amendment requiring referendum approval by the city's voters of any ordinance forbidding discrimination "on the basis of race, religion, national origin or ancestry" in the sale or rental of real estate. Housing ordinances dealing with other issues were not affected by the charter amendment and thus would become effective merely upon approval by the city council. As the *Hunter* Court expressly and repeatedly recognized, the "explicitly racial classification" (393 U.S. at 389) created by the city charter amendment was between "those who sought protection against racial bias" (*id.* at 390) in the housing market—who are by definition racial minorities, for the racial "majority needs no protection against discrimination" (*id.* at 391)—and "those who sought to regulate real property transactions in the pursuit of other ends" (*id.* at 390). Only the former class was required under the charter amendment to secure the referendum approval of the community's electorate in addition to the approval of the city council.

Petitioners argue that Proposition 1 runs afoul of *Hunter* because it removes a single judicial remedy, mandatory student assignment and transportation, from the arsenal of techniques available to a state court to enforce a school board's state constitutional duty to alleviate de facto racial segregation, but permits courts to order busing "for any other purpose—such as relieving overcrowded schools or fulfilling the educational rights of

handicapped children" (Pet. Br. 45 n.25). By establishing a "race-specific" bar to court-ordered busing, Proposition 1 creates, according to petitioners, "a two-track system of law-enforcement, under which the state's laws against racial segregation in schooling, however privately caused, are harder to enforce than are the state's laws addressing other schooling questions * * *" (*id.* at 31-32). Under petitioners' analysis, therefore, the classification created by Proposition 1 is between (1) those seeking court-ordered busing to enforce the state constitutional right "to attend a school where the school board has performed its duty to take all reasonable steps to alleviate [de facto] segregation" (Pet. App. 66a), and (2) those seeking court-ordered busing to enforce any other right recognized under California state law. While Proposition 1 is indeed "race-specific" in the sense that its obvious concern is the issue of racial isolation in California public schools, it simply does not create, contrary to petitioner's contention, a classification drawn along racial lines.[15]

---

[15] Contrary to the apparent position of petitioners (Pet. Br. 35), Proposition 1 is not a constitutionally suspect racial classification for the sole reason that it impacts upon an area of traditionally high minority concern—school segregation. The decisions of this Court make plain that in determining whether or not a legislative classification is racial and thus constitutionally suspect, the question is not whether the classification addresses a racial issue but rather whether it creates or "rests" on distinctions based on race. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971); *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Brown* v. *Board of Education*, 347 U.S. 483, 490 (1954). The classification embodied in Proposition 1 rests upon no such distinction.

Moreover, Proposition 1 is not "directed against court-ordered student assignment only when student assignment is ordered for the purpose of desegregating the public schools" (Pet. Br. 45 n.25). It does not leave "[m]andatory student assignment for any other purpose * * * untouched" (*ibid.*). By its terms, Proposition 1 removes any state constitutional obligation to bus for any reason (such as to relieve school overcrowding) except where necessary to rectify a violation of the Equal Protection Clause. See Cal. Const. art. 1, § 7 (a) (emphasis added) (*"nothing contained herein*

Nothing in the record of this case suggests, and there is no reason to assume, that the allegedly disadvantaged class—that is, the class of persons seeking court-ordered busing to enforce a school board's state constitutional duty to alleviate de facto segregation—is a racial minority or is in any way racially identifiable. The policy question that lies at the heart of Proposition 1—whether California courts should be permitted to override the discretion of local school districts and order mandatory pupil transportation to alleviate de facto racial isolation—does not split the California citizenry into racial categories. As California's experience suggests, establishing or maintaining the state courts' authority to order mandatory pupil transportation to alleviate de facto racial isolation is not exclusively the preference of racial minorities.[16] Conversely, vesting local school boards with the discretion to employ measures short of mandatory busing to alleviate de facto racial imbalance is not exclusively the preference of the racial majority. Furthermore, the benefits arising from such a policy, such as increased community support and input, enhanced safety, reduced costs and improved home-school relations (see note 12, *infra*), flow to students and

---

or elsewhere in this Constitution imposes upon the State of California or any public entity * * * any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation"). Just as the Proposition does not foreclose the possibility that school boards may be required to implement and state courts to enforce a *statutory* obligation to bus unrelated to school desegregation, nothing in the Proposition prevents California from imposing and California state courts from enforcing a statutory obligation to bus for the purpose of alleviating racial imbalance. All the Proposition does is remove any state constitutional obligation to bus—it does not prevent the state legislature from requiring such action as a matter of social policy.

[16] As noted by the 1976 opinion of the California Supreme Court in this case, alleviation of racial isolation, whether it arises from intentional discrimination or not, benefits "all students, both black and white" (17 Cal. 3d at 303 n.15; citations omitted).

parents of all races. See generally *Keyes* v. *School District No. 1*, 413 U.S. 189, 245-246 (1973) (Powell, J., concurring). As we showed in *Washington* v. *Seattle School District No. 1*, No. 81-9, Brief for the United States at 16-18 & nn. 12 & 42 [hereinafter cited as *Seattle Brief*], significant segments of both the racial majority and minority lie on either side of busing controversies. California's effort to deal with a racial issue, therefore, is not ipso facto a prohibited racial classification. As this Court has made clear (see cases cited in note 15, *supra*), the constitutional prohibition is against racial *classifications*; there is no blanket interdiction against all state attempts to deal with racial issues.

III. PROPOSITION 1 DOES NOT IMPOSE SPECIAL BURDENS ON RACIAL MINORITIES

Petitioners contend that Proposition 1 violates the Equal Protection Clause by placing "special burdens on racial minorities within the governmental process" unjustified by a compelling state interest. *Hunter* v. *Erikson*, *supra*, 393 U.S. at 391-392. See also *Gordon* v. *Lance*, 403 U.S. 1, 5 (1971); *James* v. *Valtierra*, 402 U.S. 137, 140-141 (1971). Petitioners contend (Pet. Br. 44-50) that Proposition 1 singles out a right afforded California school children under state law to attend schools free of racial isolation, whatever the isolation's cause, and subjects that right to an unusual judicial process that makes protection of the right substantially more difficult than protection of other state rights. The argument, though ingenious, should be rejected.

Initially, the essential premise of petitioners' analysis (namely, that Proposition 1 effects the "rifle-shot' removal of a remedy previously available to vindicate a state constitutional right, while leaving the underlying right intact) disregards the clear language of the Proposition, which rescinds not merely a remedy, but "any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to

the use of pupil school assignment or pupil transportation" (Cal. Const. art. 1, § 7(a)). Although the court of appeal's opinion contains language arguably supportive of petitioners' right-remedy distinction, the lower court's ultimate conclusion regarding the effect of Proposition 1 is consistent with the amendment's plain language: "In requiring that remedial aspects of the duty to desegregate conform to the requirements of the Fourteenth Amendment as interpreted by decisions of the United States Supreme Court, [Proposition 1] merely provides a more precise contour to the duty established by California law and court decisions to desegregate public schools regardless of cause" (Pet. App. 69A). Thus, while the court of appeal's discussion on this point is ambiguous at best, the court's opinion can be reconciled with the apparent plain meaning of Proposition 1, *i.e.*, that it not only restricts the use of a particular remedial technique, but also redefines the underlying substantive right to alleviation of de facto racial segregation in the public schools.

Furthermore, even assuming, as petitioners contend, that Proposition 1 does remove one remedy for a state constitutional right while leaving the right intact (Pet. Br. 35-36), elimination of that remedy in no way imposes a "special burden" on racial minorities that is prohibited by the Fourteenth Amendment. Under petitioners' reading of Proposition 1 (Pet. Br. 38-42), all courts in California, both state and federal, have clear authority to enforce the demands of the Fourteenth Amendment, and local school boards have a well-defined duty to go beyond those requirements to eliminate de facto racial segregation by all reasonably feasible means. State courts, furthermore, can use any mechanism short of mandatory pupil transportation to enforce this obligation imposed upon the school boards (Pet. App. 55A). In sum, California law—even after Proposition 1—provides racial minorities with more substantive and procedural rights than are afforded them under the federal Constitution. *Hunter* v. *Erickson*, *supra*, clearly does

not extend so far as to classify as a "special burden" *any* state action that leaves racial minorities with more protection than is mandated by the Equal Protection Clause.[17]

Petitioners' related claim that Proposition 1 constitutes "racial discrimination in the judicial apparatus of the state" (Pet. Br. 48) because it leaves a state constitutional right without a remedy is likewise groundless. Although Proposition 1 limits the availability of court-ordered busing to cases involving violations of the Fourteenth Amendment, it does not leave state constitutional rights unremedied. Even assuming that busing is highly effective in eliminating de facto desegregation, busing is still only one of "virtually scores of administrative techniques for facilitating the desegregation of school systems" (17 Cal. 3d at 305 130 Cal. Rptr. at 740). "All the amendment does is remove from the courts the remedy of pupil school assignment and pupil transportation as one among scores of remedies available for use by a court to end racial isolation" (Pet. App. 67A). Statutes, even in the area of civil rights, typically make available only a limited number of remedies for violations of their proscriptions, often withholding the most effective remedies in favor of others that promise to be less disruptive. Under Title VII of the Civil Rights Act of 1964, for example, a victim of a discriminatory employment practice is entitled only to back pay and injunctive relief, not to damages generally. 42 U.S.C. 2000e-5(g). Title VIII limits punitive damages for victims of fair housing violations to not more than $1,000. 42 U.S.C. 3612(c). Such limitations, and the burdens

[17] If, prior to Proposition 1, California had restricted the state constitutional obligation to desegregate schools to the contours of the Fourteenth Amendment, the effect of Proposition 1 as interpreted by petitioners would be to expand state constitutional protection of racial minorities. Such an "expansion" could hardly be termed a violation of the Equal Protection Clause. It is difficult to conceive how the same substantive result can violate the Fourteenth Amendment simply because it was achieved by first further expanding and then modifying state constitutional obligations.

that they place on litigants, cannot be characterized as unusual or "special" within the meaning of *Hunter* v. *Erickson*, *supra*. Nor can they be presumed to rest on distinctions based on race.[18] See *James* v. *Valtierra*, *supra*, 402 U.S. at 141 (emphasizing this requirement as the rationale of *Hunter* v. *Erickson*, *supra*).

In addition to the foregoing, petitioners' *Hunter* v. *Erickson* argument significantly exaggerates Proposition 1's impact on California law. Prior to the Proposition's enactment, school children in California did not enjoy an absolute right to attend schools free of racial isolation, nor did they enjoy a right to court-ordered pupil assignment and transportation wherever such schools did not exist. The California Supreme Court declared that school boards have a state constitutional duty "to attempt to alleviate school segregation regardless of its cause" (17 Cal. 3d at 293), but emphasized that there is no "constitutional command that each school in a district must reflect the racial composition of the district as a whole" (*id.* at 302).[19] A school board's only obligation is to take the "reasonably feasible steps to alleviate school segregation" that will "produce meaningful progress in the

---

[18] Indeed, petitioners concede that "[f]ew persons contend today that opposition to court-ordered desegregation programs like the ones here dismantled or precluded by Proposition 1 is entirely single-minded, that its only motive is racially discriminatory in character" (Pet. Br. 96).

[19] The court specifically reversed the trial court's holding that the state constitution obligated a school district " 'to use and exercise its powers and authority * * * so as to achieve, as closely as * * * good faith and fair dealing will reasonably enable and allow it to do, *integration* and *racial balance* in each of its schools so as to have a unitary school system.' (Italics added.)" (17 Cal. 3d at 302 n.12). The court explained that "from a constitutional standpoint, we see nothing inherently invalid in the fact that percentages of various racial or ethnic groups may vary, even significantly, in different schools throughout a school district, or even that a particular minority group may be completely unrepresented in a particular school" (*id.* at 304).

alleviation of such segregation and its harmful consequences" (*id.* at 305-306).[20] The California Supreme Court did not hold that busing is a necessary incident of the "meaningful progress" required by the state constitution, but to the contrary suggested that local school boards could fulfill their state constitutional obligation by " 'integrative gerrymandering' " of attendance zones (*id.* at 307), by making decisions as to the location, size, grade categories and feeder patterns of new schools "with an eye toward promoting desegregation" (*ibid.*), and by implementing voluntary majority-to-minority transfer programs (*id.* at 308).[21] More specifically, the court

---

[20] The court noted that the task of desegregation "is an extremely complex one" (17 Cal. 3d at 286) that often poses "grave practical difficulties" (*id.* at 304), and stressed that "the fastest path to desegregation does not always achieve the consummation of the constitutional objective; it may instead result in resegregation" (*id.* at 286). The court held that where a school board was fulfilling its obligation to take "reasonably feasible steps" and was producing "meaningful progress," a court "should not step in even if it believes that alternative desegregation techniques may produce more rapid desegregation in the district" (*id.* at 305-306). The court stated that "plans developed and implemented by local school boards, working with community leaders and affected citizens, hold the most promising hope" (*id.* at 286), concluding that judicial intervention into such plans was inappropriate where "a court has reason to be confident that the constitutional rights of minorities are not being ignored" (*id.* at 306).

[21] The court noted that busing is only one of the "virtually scores" (17 Cal. 3d at 305) of alternative desegregation techniques available to school boards in fulfilling their obligation to make meaningful progress in the alleviation of racial segregation (*id.* at 309). Busing "is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field" (*id.* at 309). The court did not hold that busing should either be generally utilized by school boards or ordered by courts to alleviate racial segregation. The court concluded that the use or ordering of busing in any circumstance is appropriate only where "reasonably feasible" (*id.* at 310). "[I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable" (*id.* at 309).

did not hold or suggest that implementation of a busing remedy in Los Angeles was either "reasonably feasible" or required as a matter of state law.[22] In short, prior to Proposition 1, petitioners had no secure state constitutional right to court-ordered busing in any instance where racial imbalance (not resulting from intentional segregation) occurred within a state school system. Proposition 1, therefore, which permits court-ordered mandatory busing when required by the Fourteenth Amendment and otherwise does not interfere with the discretion of local school boards regarding its use, does not impose any "special burdens" on racial minorities analogous to those invalidated in *Hunter* v. *Erickson, supra.*[23]

IV. PROPOSITION 1 WAS NOT MOTIVATED BY A DISCRIMINATORY PURPOSE

Petitioners contend (Pet. Br. 64-65) that regardless of the sufficiency of their racial classification arguments,

---

[22] As the history of this litigation indicates, a strong case may be made that busing in Los Angeles is not "reasonably feasible." Clearly, the "costs" of busing throughout the far flung Los Angeles school district are extremely high "both in financial and educational terms" (17 Cal. 3d at 309).

[23] The court of appeal also properly rejected the petitioners' contention, raised in this Court in their petition for a writ of certiorari but not in their brief on the merits, that Proposition 1 violates this Court's decision in *Reitman* v. *Mulkey*, 387 U.S. 369 (1969). In *Reitman*, the Court affirmed the holding of the California Supreme Court that a state constitutional amendment guaranteeing a private right to discriminate in the sale or rental of real property "significantly encourage[d] and involve[d] the State in private discriminations" and thus violated the Equal Protection Clause (*id.* at 381). See also *Palmer* v. *Thompson*, 403 U.S. 217, 233-234 (1971).

Unlike the state constitutional amendment at issue in *Reitman*, however, Proposition 1 does not address at all the ability of the state to regulate private discrimination. Nor does it remove from school authorities in the state the obligation to avoid and redress racial isolation in schools caused by their own discrimination. Indeed, under the Proposition, California school boards retain an affirmative obligation, beyond that mandated by the Fourteenth Amendment, to take steps to alleviate racial isolation, whatever its cause (Pet. App. 55A).

Proposition 1 is unconstitutional because it was motivated by an improper discriminatory purpose. The California court of appeal properly rejected this argument.

In determining whether Proposition 1 was motivated by a discriminatory purpose, the inquiry becomes whether the measure has a disparate adverse impact upon a racial minority, and if so, whether that impact can be traced to a discriminatory purpose. *E.g., Personnel Administrator of Massachusetts* v. *Feeney, supra.* Contrary to the assertions of petitioners (Pet. Br. 71-80), there is no evidence in this record that Proposition 1 "bears more heavily on one race than another'" (*Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), much less that any adverse consequences for minorities are "inevitable" (Pet. Br. 71). Petitioners' contention that Proposition 1 visits a disproportionate impact on racial minorities attending Los Angeles public schools overlooks the fact that the majority of students attending Los Angeles public schools belong to minority racial groups—only 23.7% of the total student population and 16.1% of grades K-3 are white. By arguing that anything which "frustrate[s] imposition of a program using mandatory reassignment" necessarily results in adverse effects "felt principally by minorities" (Pet. Br. 79), petitioners imply, as noted by the court of appeal, "that ethnic minority children, even though they constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students" (Pet. App. 45A n.3).

Furthermore, there is no sound basis to infer that Proposition 1 will adversely affect any racial group—majority or minority. Proposition 1 does not eliminate the judicially enforceable state constitutional obligation of California school boards to take all reasonably feasible steps to alleviate segregation regardless of cause. This obligation is not, as petitioners assert, "'a promise to the ear to be broken to the hope'" (Pet. Br. 97) merely

because one remedial device—court-ordered mandatory busing—is available only to remedy purposeful discrimination. California courts retain broad remedial powers to enforce state desegregation law. See Pet. App. 55A.[24]

Even beyond the showing that Proposition 1 has no disproportionate and adverse impact on minority students, the evidence in the record of this case, as the court of appeal correctly concluded, is wholly inadequate to establish "that a [racially] based discriminatory purpose has, at least in some measure, shaped" Proposition 1. *Personnel Administrator of Massachusetts* v. *Feeney*, *supra* 442 U.S. at 276.

The motivating purposes behind the enactment of Proposition 1 are set forth in the provision itself.[25] These purposes, such as conservation of financial resources, maximization of educational opportunities, and enhancement of public participation in the educational process, provide no basis for inferring racial animus. Indeed, the stated goals of Proposition 1 essentially catalogue the race-neutral advantages of neighborhood schools, which inure to students and parents of all races. See *Keyes* v. *School District No. 1*, 413 U.S. 189, 245-246 (1973) (Powell, J., concurring); *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 450-451 (1980) (Powell, J., dissenting). The state court of appeal would have been justified in rejecting this explicit statement of legislative purpose only if "an examination of the legislative scheme and its history demonstrate[d] that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975); *Michael M.* v. *Superior Court*, 450 U.S. 464, 470 (1981) (Rehnquist, J., announcing judgment).

---

[24] Moreover, Proposition 1 in no way interferes with a local school board's authority to permit any school assignment voluntarily sought by a student. Accordingly, any student attending a racially identifiable public school and seeking reassignment to a more integrated school need only secure the school board's approval to achieve his goal.

[25] See note 12, *supra*.

The court of appeal, however, properly dismissed as "pure speculation" the assertion that "the voters who supported Proposition 1's restrictions on mandatory school assignment by race of children outside their home areas were motivated by specific intent to effect racial segregation and by discriminatory purpose" (Pet. App. 64A).

Petitioners argue that notwithstanding the court of appeal's finding of racially neutral intent, this Court must find as a matter of law that Proposition 1 was motivated by racial animus. They contend that an analysis of the impact, sequence of events leading up to adoption, substantive and procedural departures from the norm, and legislative history of Proposition 1 clearly raise an inference of discriminatory purpose. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266. A "sensitive inquiry" (*ibid.*) into these factors, however, confirms rather than weakens the conclusion of the state court below.

This Court has made clear that the existence and foreseeability of a disproportionate adverse impact on minorities do not in themselves establish an intent to discriminate against the affected minorities. In determining whether a challenged governmental action was at least partially motivated by discriminatory purpose, a finding that the action has discriminatory consequences is *relevant* only insofar as it appears that such consequences were actually anticipated, see *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464-465 (1979), and *decisive* only insofar as it appears that such consequences were "desired"—that is, "that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 & n.25. There is no such evidence in this case.

As petitioners pointed out (Pet. Br. 80-81), Proposition 1 was passed by the legislature and adopted by

the state electorate amid speculation that the trial court in this case was preparing to institute a racial balancing plan for the entire Los Angeles metropolitan area, entailing court ordered, non-neighborhood busing in more than 100 suburban school districts. Contrary to petitioners' arguments (*id.* at 81-82), however, this sequence of events does not raise per force an inference of discriminatory purpose. The desire of California voters to limit the availability of mandatory busing in the absence of a violation of the Equal Protection Clause is merely an expression of support for the maintenance of neighborhood schools. Since neighborhood schools provide substantial advantages to both minority and non-minority students, opposition to mandatory busing is not a litmus test for racial animus. The choice made by the voters of California is entirely consistent with a good faith belief that the advantages of a neighborhood school system outweigh the advantages of a racial balancing system—a preference reflected in the substantial support for Proposition 1 in the minority community itself.[26] Nor does implementation by a state's electorate of a policy favoring neighborhood schools, in and of itself, raise an inference of racial discrimination. *Austin Independent School District* v. *United States*, 429 U.S. 990, 994 (1976) (Powell, J., concurring); *United States* v. *Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977). See also *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 450 (1980) (Powell, J., dissenting).

---

[26] See J.A. 268-269 (statement of Mayor Tom Bradley) ("Most parents, whatever their color, whatever their background, wherever they live, don't want their kids transported back and forth across the city"). See also note 4, *supra*. Cf. our brief in *Seattle* at 43 & n.42.

Moreover, a state referendum cannot be said to have been motivated by a discriminatory purpose merely because some voters may have supported it for discriminatory reasons. See, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring); *City of Mobile* v. *Bolden*, 446 U.S. 55, 83-94 (1980) (Stevens, J., concurring in judgment).

Although petitioners labor mightily (Pet. Br. 83-88), they are unable to point to any significantly enlightening substantive or procedural departures from the norm in the enactment of Proposition 1. The fact that the Proposition was presented to the voters in a special election (*id.* at 84) is of little import in light of the fact that three other initiatives were also presented to state voters in that election. See note 4, *supra*. The further fact that Proposition 1 impacts upon a decision of the state supreme court (Pet. Br. 84) and modifies the remedial power of state courts (*id.* at 86) likewise is not a departure from but rather is the norm. See *People* v. *Frierson*, 25 Cal. 3d 142, 599 P.2d 587 158 Cal Rptr. 281 (1979) (upholding the constitutionality of Cal. Const. art. 1, § 27, which reversed a prior California Supreme Court decision regarding the constitutionality of the death penalty under state law). Finally, Proposition 1 does not sever "the link between right and remedy" (Pet. Br. 86); it leaves California courts with "scores of remedies available for use * * * to end racial isolation" (Pet. App. 67a).

The legislative history of Proposition 1, as already noted, is consistent with a racially neutral belief in the benefits of neighborhood schools. While petitioners make much of asserted past acts of discrimination by the State of California and the Los Angeles School Board, they ignore the fact that the campaign for Proposition 1 was "low key, low budget and low visibility" (*S.F. Examiner & Chronicle*, Nov. 4, 1979, § A, at 6, col. 1), with no appeals made to racist sentiment (note 4, *supra*). The historical acts of discrimination noted by petitioners (Pet. Br. 89-90), furthermore, do not indicate that the state electorate was motivated by racial animus in its adoption of Proposition 1. As was recently noted in *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1970) (Stewart, J., announcing judgment):

> [P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains

whether a discriminatory intent has been proven in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

The less than pristine history of official prejudice in California, as well as the alleged efforts of the Los Angeles School Board to "defeat integration" (Pet. Br. 90 n.51), do not require a finding that the voters of the State of California were racially motivated when they cast their ballots in favor of Proposition 1. See *City of Memphis* v. *Greene*, No. 79-1176 (Apr. 20, 1981), slip op. 16 n.27 (upholding city street closing challenged as discriminatorily motivated, despite a history of discriminatory provision of city services and "evidence that racial prejudice still exists in Memphis"). The state court of appeal, upon all the evidence adduced in this case, concluded that Proposition 1 was not passed with segregative intent or for a discriminatory purpose (Pet. App. 63A to 65A). This conclusion deserves substantial deference from this Court. Inquiries into legislative motives or purposes are at best "a hazardous matter," *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968); *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971), and "the search for legislative purpose is often elusive," *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973). The difficulties increase exponentially where, as here, the inquiry requires examination of a decision made not just by a legislature but by the state electorate. While some intemperate remarks by individuals will almost inevitably enter into the public debate when the issue touches upon racial concerns or other sensitive areas, that circumstance should not in itself disable the people of a state from utilizing the referendum form of governmental process. This Court has properly cautioned judicial reluctance to impute improper purpose in such a context. *James* v. *Valtierra*, *supra*, 402 U.S. at 143. In this case the inquiry should be guided not only by general deference to the propriety of state lawmaking efforts by its people, but also by the specific determination of the court of

appeal that Proposition 1 was not animated by a discriminatory purpose. As this Court has previously recognized in another case involving a constitutional amendment adopted by California voters, state courts "armed * * * with the knowledge of the facts and circumstances concerning the passage and potential impact" of a challenged enactment are, as an institutional matter, better able than this Court to determine legislative purpose since they are "familiar with the milieu in which [the enactment] would operate." *Reitman* v. *Mulkey*, 387 U.S. 369, 378 (1967). The holding of the California Court of Appeal that Proposition 1 was not motivated by a discriminatory purpose should be affirmed.

CONCLUSION

The judgment of the court of appeal should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

CHARLES JUSTIN COOPER
Attorney

FEBRUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 365606 785